



Appendix: Fee Waiver

A. Disclosure Is in the Public Interest

PETA is entitled to a fee waiver for the FOIA request of data evaluation records (DERs) and Cancer Assessment Review Committee (CARC) reports under the test established by the FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and agency regulations, 40 C.F.R. § 2.107(l)(2)(i)-(iv). Specifically, these provisions state that the agency will grant a request for a fee waiver when disclosure (1) is in the public interest and (2) is not primarily in the commercial interest of the requester.

The FOIA and agency regulations define disclosure as being “in the public interest” for purposes of the first prong of the fee waiver analysis if it is “likely to contribute significantly to public understanding of the operations or activities of the government.” See 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1).

To receive a fee waiver, the following factors must be satisfied:

- (i) *The subject of the request*, i.e., whether the subject of the requested records concerns the operations or activities of the government;
- (ii) *The informative value of the information to be disclosed*, i.e., whether the disclosure is likely to contribute to an understanding of the EPA operations or activities;
- (iii) *The contribution to an understanding of the subject by the general public likely to result from disclosure*, i.e., whether disclosure of the requested information will contribute to public understanding, including whether the requester has expertise in the subject area as well as the intention and ability to disseminate the information to the public; and
- (iv) *The significance of the contribution to public understanding*, i.e., whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

40 C.F.R. § 2.107(l)(2)(i)-(iv). Each of these factors has been met and is addressed below.

1. The subject of PETA’s FOIA request concerns the operations or activities of the EPA.

It is unquestionable that the subject of PETA’s FOIA request—information concerning chemical DERs and CARC reports—concerns the operations or activities of the government. Specifically, the EPA creates DERs and CARC reports after it analyzes scientific data submitted in the form of Study Reports from pesticide registrants to develop human health and ecological risk assessments. See e.g. <https://www.epa.gov/foia/pesticide-information-resources>. Further, the EPA requires that these registrants use animal experiments as a basis

PEOPLE FOR
THE ETHICAL
TREATMENT
OF ANIMALS

Washington, D.C.

1536 16th St. N.W.
Washington, DC 20036
202-483-PETA

Los Angeles

2154 W. Sunset Blvd.
Los Angeles, CA 90026
323-644-PETA

Norfolk

501 Front St.
Norfolk, VA 23510
757-622-PETA

Oakland

554 Grand Ave.
Oakland, CA 94610
510-763-PETA

Info@peta.org

PETA.org

Affiliates:

- PETA Asia
- PETA India
- PETA France
- PETA Australia
- PETA Germany
- PETA Netherlands
- PETA Foundation (U.K.)

for the Study Reports it submits to the EPA for the generation of DERs and resulting risk assessment.

Thus, there is no question that the records requested by PETA concern the EPA's activities and operations.

2. Disclosure of the records will reveal meaningful information about the operations or activities of the EPA.

Release of the requested records will reveal meaningful information about the EPA's evaluation of the pesticide Study Reports. Specifically, review of the disclosed DERs and CARC reports will reveal information about the necessity of the EPA-required animal tests—including, acute, subchronic, reproductive, developmental, and carcinogenicity tests—and how data from those tests are used by the EPA as a basis to inform chronic risk assessment for humans, including cancer risk.

The public has an interest in, a right to know, whether the EPA is making sound decisions when using taxpayer resources for regulatory risk assessment requirements and its requirement that registrants use animals in experiments for Study Reports that form the basis of DERs.

In addition, the disclosed DERs will be meaningful as the information requested is not made available to the public by the EPA, nor is it readily available through any other avenue. Indeed, before submitting the above-referenced FOIA request, PETA searched publically available DERs on www.regulations.gov and <https://iaspub.epa.gov/apex/pesticides/f?p=chemicalsearch:1> to ensure duplicate requests have not been submitted to the EPA. Therefore, the only way for PETA and the public to gain understanding of the requested DERs and the associated risk assessments is to have access to public records in the possession of the EPA.

3. Disclosure will advance the understanding of the general public

Disclosure of the records that PETA seeks will contribute to the public's understanding of the EPA's use of the DERs and CARC reports for the development of risk assessments, and the EPA's animal testing requirement by ensuring this information is disseminated to the public and a broad audience of people interested in this topic. For example, PETA will share this information with its affiliates, including the PETA International Science Consortium Ltd (Science Consortium) which will lead efforts for data analysis and international outreach. For example, the Science Consortium intends to publish a review article in a peer-reviewed scientific journal that will be available to the public and a broad audience of the people who are interested in this subject at no charge in an "open access" format. Moreover, the Science Consortium intends to disseminate the disclosed information to members of the public who are

interested in the subject through multiple free presentations in 2019 and 2020. Each presentation is expected to have hundreds of people in the audience.

Further, PETA intends to disseminate this information to a broad segment of the public through one or more of the following methods, all of which are regularly used to inform the public about the operations and activities of the federal government:

- PETA's websites, including <http://www.peta.org> (more than 170,000 visitors daily);
- PETA e-news (more than 1,873,000 subscribers);
- The PETA Files blog, <http://blog.peta.org/> (more than 300,000 visitors monthly, and sometimes more than 650,000 visitors monthly);
- PETA *Global*, a publication with a worldwide circulation of approximately 400,000;
- PETA's news releases, through which it has disseminated information to the public through the print media, including The New York Times and other widely read publications; and
- PETA's accounts on social media platforms, including Twitter (more than 1.1 million followers), among others.

In addition, the Science Consortium intends to disseminate this information to the public through one or more of the following methods, which are also used to inform the public about animal testing and the federal government:

- The Science Consortium's website <https://www.piscltd.org.uk/>;
- The Science Consortium's social media pages, including LinkedIn (approximately 400 followers), and Twitter (approximately 1000 followers).

Case law has found that the above mentioned methods of dissemination are more than sufficient to demonstrate that the disclosure of information will advance the understanding of the general public. For example, in *Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 203-05 (D.D.C. 2009) the Federal Bureau of Prisons argued that FedCURE's FOIA request was inadequate to merit a fee waiver because it did not demonstrate its ability to disseminate the requested materials to a "reasonably broad segment of the public, since its website is a passive distribution source, and its newsletter is infrequently published." *Id.* The court disagreed and found that "FedCURE ha[d] the necessary means to disseminate the requested information to a reasonably broad segment of the public" because its "website...provides timely news for the public" and has "had over 250,000 hits" in two years; its "chat site at Yahoo Groups had as many as 100 requests for information each day;" and its email newsletter had 2,000 subscribers." *Id.* As detailed above, PETA's ability to disseminate information to the public through its website and its other methods are *significantly* greater than FedCURE's ability. Therefore, the dissemination methods of PETA and its affiliates are more than sufficient to demonstrate that the disclosure of information will contribute to the

understanding of the general public's knowledge about the EPA's use of DERs to inform risk assessment and its requirements for pesticide testing. This is especially true when "liberally construing the fee waiver provision of the FOIA in the favor of the requester," which is required under FOIA case law. *Id.*

In addition, in *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 26-27 (D.D.C. 2006) the court found that Prison Legal News "demonstrated its ability to distribute [its] printed journal to the public" because it had "3,400 reported subscribers and an estimated readership population of 18,000." Similarly, in *In Def. of Animals v. Nat'l Institutes of Health*, 543 F. Supp. 2d 83, 110 (D.D.C. 2008), the plaintiff's statement that its methods of disseminating information included "web sites, alerts, newsletter and [its] network of other national and international media contacts" was sufficient to demonstrate that the information would be widely distributed. In this case, the plaintiff's websites received more than 55,000 hits per day and more than 1.6 million hits per month and that its quarterly newsletter reached more than 65,000 people. *Id.* Furthermore, in *Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1180 (10th Cir.2005) the court found that because the plaintiff "publishes an online newsletter, which is e-mailed to more than 2,500 people" and stated that it "intend[s] to establish an interactive grazing web site" with the information obtained from the BLM, it was likely to advance the understanding of the general public."

Moreover, courts have held that "[i]nformation need not actually reach a broad cross-section of the public in order to benefit the public at large." *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 814 (2d Cir. 1994) (rejecting the DOJ's "unreasonable" position that use of the requested information in the plaintiff's "dissertation, scholarly articles, college classes, panels and conventions and in his tentative book" would not reach a large enough population.) Indeed, in *Cause of Action v. F.T.C.*, 2015 WL 5009388 (D.C. Cir. Aug. 25, 2015) the FTC rejected the plaintiff's request for a fee waiver arguing that the FTC regulations required that the requested documents had to "increase understanding of the public at large." The court rejected this argument and noted that the FOIA "requires only that the disclosure be likely to contribute significantly to 'public' understanding" and that the FOIA does not require a requester to show an ability to convey the information to a "broad segment" of the public or to a "wide audience." *Id.* at *6. Rather, the court stated "the relevant inquiry ... is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject." *Id.* (internal quotation marks omitted) Further, the court suggested that dissemination of information solely by a website could be a sufficient means of dissemination. *Id.* ("There is nothing in the statute that specifies the number of outlets a requester must have, and surely a newspaper is not disqualified if it forsakes newsprint for (or never had anything but) a website.")

As illustrated by PETA and the Science Consortium's numerous methods of dissemination and the vast number of people that PETA and its affiliates informs about animal protection issues and the operations and activities of the government, including government-required animal testing and the

EPA's use of data collected from animal studies, it is unquestionable that PETA has the capability and intention to share the information it receives with the public, especially to a "reasonably broad audience...interested in the subject." Therefore, disclosure of the requested records will advance the public's understanding of the operations or activities of the EPA and PETA has satisfied the third factor of the fee waiver test.

4. The information will significantly broaden public understanding of the operations of the EPA.

The documents PETA seeks will contribute "significantly" to the public's understanding of the government's operations or activities. Whether there is a "significant" contribution is determined by "comparing the public understanding with and without potential disclosure." *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 116 (D.D.C. 2006).

Here, the requested records will inform the public about the EPA's use of DERs and CARC reports to develop risk assessments, especially with regard to cancer in humans, and the EPA's requirements for animal use for pesticide registration. As discussed above, this information is not publicly available, and therefore disclosure would contribute to unknown facts, thereby enhancing public knowledge.

Moreover, there is public interest in cancer risk assessment and the use of animal tests in predicting human health, as indicated by the more than sixty scientific peer-reviewed publications on the topic, likely meaning that the public will be interested in knowing about the government's activities related to the DERs, CARC reports, and risk assessment that are the subject of PETA's FOIA request.¹ The DERs and CARC reports will be used in a weight of evidence assessment of subchronic studies and evaluate how those studies can be used to inform potential chronic outcome. Further, case law supports the fact that PETA has met the fourth factor of the FOIA fee waiver test. In *Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 203-05 (D.D.C. 2009) the Federal Bureau of Prisons argued that

[d]isclosure of the information sought by the plaintiff will not contribute *significantly* to public understanding because of the limited number of individuals who will receive the information, and the even smaller subset that will understand it due to the highly technical nature of the information. (emphasis added)

The court disagreed and said that "any dissemination of information" by the plaintiff would enhance the public's understanding because the information "is

¹ Based on a 8-8-2019 PubMed search using the search criteria "((Carcinogenicity Assay) OR (Carcinogenicity Test) OR Rodent Cancer Bioassay) AND Human Relevance" from 1980 to 2019.

not available to the public.” *Id.* The court found that “placing such data on a website, in an online newsletter, or in response to chat queries is an acceptable manner of making...data accessible to the public” and satisfies the fourth factor of the FOIA fee waiver test. *Id.* at 205-206.

In *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 36 (D.C.Cir.1999), the court was clear that even *if* information that a requester is seeking is already in the public domain, the requester can still receive a fee waiver. Specifically, the court said:

[T]he mere fact that material is in the public domain does not justify denying a fee waiver; only material that has met a threshold level of public dissemination will not further ‘public understanding’ within the meaning of the fee waiver provisions.

As clearly detailed above, PETA’s team of researchers intends to analyze, synthesize, and disseminate such information to the public, including by publishing the information in a peer-reviewed journal, presentations, and by putting it on its website.

Thus, because PETA has a demonstrated ability and intention to effectively disseminate the information contained in those records, release is in the public interest and the first prong of the fee waiver provision of the agency’s regulations, 40 CFR 2.107 is clearly met.

B. PETA Has No Commercial Interest in the Requested Documents

The second prong of the fee waiver analysis is whether disclosure of the information is “primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107. PETA has no commercial interest in the requested documents and this was made clear in PETA’s July 24, FOIA request. In fact, PETA frequently requests and receives FOIA public interest fee waivers, including from the EPA for DERs requested on 7-24-2019.²

As a 501(c)(3) nonprofit organization, PETA will not profit from disclosure of the information contained in these records and does not have a commercial interest in the information. Indeed, PETA’s mission is to educate the public about animal protection issues, including animals used in experiments, and it disseminates such information to the public at no cost.

A fee waiver would also fulfill Congress’s legislative intent in amending FOIA in 1986 to “ensure that it be ‘liberally construed in favor of waivers for

² PETA has been granted numerous fee waivers, including from the United States Environmental Protection Agency, the United States Department of Agriculture, the National Oceanic and Atmospheric Administration, the Bureau of Indian Affairs, the Food and Drug Administration, the Air Force, Amtrak, and the Occupational Safety and Health Administration

noncommercial requesters. *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted)).

For the foregoing reasons, PETA meets the qualifications for a full fee waiver.